

December 8, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-41 is available for public comments under this procedure. It was requested by counsel, Cleta Mitchell, Esq. on behalf of the CUNA Mutual Insurance Society.

Proposed Advisory Opinion 2004-41 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 16, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on December 15, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-41, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 8, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Richard T. Ewell
Attorney

Ron Katwan
Attorney

Subject: Draft AO 2004-41

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 16, 2004.

Attachment

1 ADVISORY OPINION 2004-41

2
3 Cleta Mitchell, Esq.
4 Foley & Lardner LLP
5 3000 K Street, N.W.
6 Washington, D.C. 20007

BLUE DRAFT

7
8 Dear Ms. Mitchell:

9 This advisory opinion responds to your letter dated June 14, 2004, as
10 supplemented by your letters dated September 16 and October 25, 2004 and by your
11 email-communications dated November 19 and 20, on behalf of CUNA Mutual Insurance
12 Society (“CUNA Mutual”), requesting confirmation that CUNA Mutual’s new separate
13 segregated fund (“SSF”), CUNA Mutual PAC, is not affiliated with the Credit Union
14 Legislative Action Council (“CULAC”), the longstanding SSF of the Credit Union
15 National Association (“CUNA”). Based on an examination of the overall relationship
16 between the two sponsoring organizations, CUNA Mutual and CUNA, the Commission
17 concludes that CUNA Mutual PAC is not affiliated with CULAC.

18 ***Background***

19 CUNA is a trade association and is incorporated in the State of Wisconsin as a
20 non-stock, non-profit corporation with members. *See* Advisory Opinions 2000-15 and
21 1998-19. CUNA is composed of 51 credit union leagues representing all 50 states and
22 the District of Columbia (“State Leagues”), as well as approximately 8,250 individual
23 State-chartered or Federally chartered credit unions, which are themselves members of
24 the various State Leagues and CUNA.

25 CUNA Mutual, a for-profit mutual insurance company offering a variety of
26 insurance products to credit unions and their members, was established by certain CUNA

1 officers and directors in 1935. Following the creation of CUNA Mutual in 1935, CUNA
2 Mutual and CUNA initially worked closely together within a single general framework,
3 but they eventually formed separate governing boards in 1956 and entered into a “period
4 of mutual acrimony that lasted until the late 1960s.”

5 CUNA Mutual is currently governed by a thirteen-member board of directors,
6 each of whom is elected by CUNA Mutual’s 135,000 policyholders. Each policyholder
7 is entitled to only one vote, even if he or she holds more than one policy with CUNA
8 Mutual. Since the late 1960s, the CUNA Mutual and CUNA have periodically entered
9 into various business agreements as part of a general effort of cooperation. Recent
10 agreements include:

- 11 • Mutual Cooperation Agreement – a formal contract in which the two
12 organizations agree to work together to address lending solutions, education
13 and training, and promotional opportunities. Under this agreement, CUNA
14 Mutual pays both fixed and variable compensation to CUNA based on CUNA
15 Mutual’s revenue growth.
- 16 • Resolution of Mutual Support and Advocacy – a joint resolution (not a
17 binding contract) in which CUNA Mutual has promised to work with CUNA
18 to ensure CUNA’s success as a national trade association and to support
19 CUNA’s efforts to provide credit unions with political leadership and
20 legislative, regulatory, education and training expertise. In exchange, CUNA
21 has promised to support CUNA Mutual to ensure its success as a provider of
22 insurance and financial services.

- 1 • Exclusive Endorsement Agreement (terminated December 2003) – CUNA
2 agreed to endorse the products and services of CUNA Mutual in exchange for
3 an endorsement fee.
- 4 • Investment in Growth Agreement (terminated January 2004) – CUNA Mutual
5 agreed to provide funding in support of CUNA’s core trade association
6 activities, while CUNA agreed to provide certain legislative lobbying,
7 education and training services for, and on behalf of, CUNA Mutual.
8 Pursuant to this agreement, CUNA Mutual made a one-time start up
9 contribution of \$50,000 to assist CUNA in its legislative and political
10 advocacy.
- 11 • Transition Services Agreement – CUNA Mutual Business Services, Inc., an
12 entity controlled by CUNA Mutual, agreed to purchase certain information
13 technology services from CUNA as part of an agreement in 1999 whereby
14 CUNA Mutual acquired most of the operations of a CUNA-owned enterprise,
15 CUNA Services Group, Inc.

16 You represent that each of the agreements described above reflects an arm’s
17 length transaction with market-based pricing. CUNA Mutual and CUNA also provide
18 each other with certain other support, services, and benefits, which you characterize as
19 “customary business arrangements” for contracting parties in an “overlapping business
20 marketplace.” For example, the two organizations have a marketing agreement in which
21 CUNA Mutual pays CUNA for a list of CUNA members to whom CUNA Mutual then
22 markets products and services through its ordinary commercial practices. CUNA also
23 licenses to CUNA Mutual the use of the “CUNA hands-and-globe” logo, while CUNA

1 Mutual leases office space to CUNA. CUNA itself also holds several insurance policies
2 through CUNA Mutual. As noted above, however, because CUNA Mutual's
3 policyholders are each entitled to only one vote on CUNA Mutual matters, CUNA is
4 entitled to one vote of a possible 135,000 voting CUNA Mutual policyholders.

5 In addition, CUNA Mutual is one of the participants in CUNA's Partnership
6 Committee, which also includes representatives from the American Association of Credit
7 Union Leagues, the Association of Corporate Credit Unions, the Filene Research
8 Institute, the U.S. Central Credit Union, and the World Council of Credit Unions. This
9 Committee does not possess any governing responsibilities for any organization, but
10 rather "exists to consider long-range planning issues and develop improved coordination
11 between the national credit union organizations." CUNA Mutual is also a member of
12 several other trade associations.

13 Additional facts are included below in connection with the affiliation analysis.

14 ***Question Presented***

15 Is CUNA Mutual PAC, CUNA Mutual's SSF, affiliated with CULAC, the SSF of
16 CUNA?

17 ***Legal Analysis***

18 No. The Federal Election Campaign Act of 1971, as amended (the "Act"), and
19 Commission regulations provide that committees, including SSFs, that are established,
20 financed, maintained or controlled by the same corporation, person, or group of persons,
21 including any parent, subsidiary, branch, division, department, or local unit thereof, are
22 affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1)(ii). Contributions made

1 to, or by, such committees are considered to have been made to, or by, a single
2 committee. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1).

3 An entity that owns a majority interest of another organization, such as a parent
4 corporation with a subsidiary, is affiliated *per se* with that other organization. See 11
5 CFR 100.5(g)(2). In the absence of *per se* affiliation, Commission regulations provide
6 ten circumstantial factors for a case-by-case examination of the overall relationship
7 between the two organizations to determine whether one organization has established,
8 financed, maintained or controlled the other committee or sponsoring organization and,
9 hence, whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J),
10 11 CFR 110.3(a)(3)(i) and (ii)(A)-(J). These ten circumstantial factors, each of which is
11 discussed below in turn, do not constitute an exhaustive list and other factors may be
12 considered. See, e.g., Advisory Opinion 2000-28 (finding that an unincorporated
13 business association and an incorporated trade association were disaffiliated after the
14 execution of a separation agreement severing organizational, operational, and formal
15 ties).

16 **A. Whether a sponsoring organization owns a controlling interest in the**
17 **voting stock or securities of the sponsoring organization of another**
18 **committee. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A).**

19 You state that CUNA Mutual and CUNA “have no ownership interest in the
20 other’s corporate organization.” Neither CUNA Mutual nor CUNA is a stock based
21 corporation. Accordingly, neither issues stock or securities. Although CUNA Mutual
22 issues insurance policies and its policyholders are analogous to stockholders, CUNA, as a

1 single policyholder, is entitled to only one vote out of a possible 135,000 votes on matters
2 presented for policyholder action (the most common being elections of directors).

3 CUNA itself is a trade association controlled by its voting members, which are the
4 State Leagues and member credit unions. CUNA Mutual is not eligible to become a
5 voting member of CUNA and therefore does not possess any voting interest with respect
6 to CUNA.

7 **B. Whether a sponsoring organization or committee has the authority or**
8 **ability to direct or participate in the governance of another sponsoring**
9 **organization or committee through provisions of constitutions, bylaws,**
10 **contracts, or other rules, or through formal or informal practices or**
11 **procedures. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B).**

12 Both CUNA Mutual and CUNA lack the authority or ability to direct or
13 participate in the governance of the other organization. Neither CUNA Mutual nor
14 CUNA includes any reference to the other organization in its bylaws. There are no
15 formal agreements that permit one organization to participate in the governance of the
16 other organization in any way, except for CUNA's ability to cast a single vote as a
17 CUNA Mutual policyholder, as noted above. Although the two organizations have
18 entered into a "Mutual Cooperation Agreement," that agreement does not convey any
19 governance authority, or even partnership status. Instead, the agreement appears to
20 represent an arm's length business transaction. Similarly, the other mutual support
21 agreements described above do not appear to alter the governance of either organization
22 in any way.

1 In addition, you state that neither CUNA Mutual nor CUNA plays any role
2 whatsoever, formally or informally, in the management or governance of the other.

3 **C. Whether a sponsoring organization or committee has the authority or**
4 **ability to hire, appoint, demote or otherwise control the officers, or other**
5 **decision-making employees or members of another sponsoring organization**
6 **or committee. 11 CFR 100.5(g)(4)(ii)(C) and 110.3(a)(3)(ii)(C).**

7 You have represented that neither CUNA Mutual nor CUNA has the authority to
8 hire, appoint, demote, or otherwise control the officers or other decision-making
9 employees of the other organization. Moreover, as noted above, CUNA is only one of
10 135,000 policyholders of CUNA Mutual insurance policies and thus does not possess the
11 capacity to exert any significant authority or control over the officers or other decision-
12 making employees of CUNA Mutual. *See* Advisory Opinion 2003-21 (it is “unlikely that
13 a 19 percent shareholder could elect an additional board member on its own.”) As noted
14 above, CUNA Mutual is not eligible to become a member of CUNA and does not possess
15 any voting interest with respect to CUNA.

16 **D. Whether a sponsoring organization or committee has a common or**
17 **overlapping membership with another sponsoring organization or committee**
18 **which indicates a formal or ongoing relationship between the sponsoring**
19 **organizations or committees. 11 CFR 100.5(g)(4)(ii)(D) and**
20 **110.3(a)(3)(ii)(D).**

21 Both CUNA Mutual and CUNA are membership organizations for purposes of
22 the Act. First, CUNA Mutual is a membership organization because it is a mutual
23 insurance society with its policyholders as members, each possessing both a financial

1 attachment and participatory rights. *See* 11 CFR 100.134(f) and 114.1(e)(2); Advisory
2 Opinion 1999-10. With regard to CUNA, the Commission has already concluded in
3 Advisory Opinions 1998-19 and 1991-24 that CUNA is a membership organization
4 whose members are State Leagues and individual credit unions.

5 Therefore, for purposes of examining the overlapping membership of CUNA
6 Mutual and CUNA, the Commission examines the overlap between CUNA Mutual's
7 policyholders on the one hand, and CUNA's State Leagues and member credit unions on
8 the other. Although your request does not specify the number of State Leagues and
9 CUNA-member credit unions that are also CUNA Mutual policyholders, a substantial
10 percentage of CUNA's members may also hold CUNA Mutual policies. However,
11 because there are a sum total of approximately 8,300 State Leagues and CUNA-member
12 credit unions, and there are approximately 135,000 CUNA Mutual policyholders, the
13 State Leagues and CUNA-member credit unions could represent no more than 8,300 out
14 of 135,000, or 6.1%, of CUNA Mutual's policyholders. This overlap is therefore not
15 significant in this situation.

16 Even assuming that there is extensive overlap between CUNA Mutual
17 policyholders and CUNA's member credit union accountholders, this overlap would not
18 constitute sufficient evidence of an ongoing or formal relationship between the two
19 organizations. In other circumstances, membership overlap may provide evidence of a
20 formal or ongoing relationship where two organizations are populated by largely the
21 same people in a manner suggesting an organized control over both groups. *See, e.g.,*
22 Advisory Opinions 2002-15 (overlaps of 71% and 100% between the members of two
23 organizations contributed to conclusion of affiliation between the two organizations) and

1 1995-12 (State association was affiliated with a related national association where 83% of
2 the national members were members of the State association and 65% of the State
3 association members were members of the national association.) Here, however, the
4 formal and ongoing relationship between CUNA Mutual and CUNA is limited to arm's
5 length transactions and marketing and endorsement agreements, and the overlap between
6 CUNA Mutual policyholders and CUNA-member credit union accountholders appears to
7 be a *consequence* of these business arrangements, rather than evidence of the
8 relationship.

9 Other characteristics of the membership of each organization also lessen the
10 importance of the overlap in this situation. CUNA Mutual policyholders and the credit
11 union accountholders are large, diffuse groups that do not appear organized or unified in
12 a fashion such that they could control both entities. The overlap between CUNA Mutual
13 policyholders and CUNA-member credit union accountholders is not the result of any
14 provision in the bylaws of either group or any other requirement forcing the
15 accountholders to purchase CUNA Mutual insurance policies. CUNA Mutual has chosen
16 to enter into a mutually beneficial business arrangement with CUNA, and CUNA Mutual
17 offers its customers products and benefits that are distinct from those offered by CUNA
18 and its member credit unions. Individual credit union accountholders must therefore
19 make separate individual choices regarding whether to purchase a CUNA Mutual
20 insurance policy.

21 Accordingly, the Commission concludes that, in this situation, even if there is
22 significant overlap between CUNA Mutual policyholders and the accountholders of

CUNA-member credit unions, such overlap would not by itself constitute sufficient evidence that one organization currently finances, maintains or controls the other.

E. Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees. 11 CFR 100.5(g)(4)(ii)(E) and 110.3(a)(3)(ii)(E).

There are no overlapping management personnel, officers, or employees between CUNA Mutual and CUNA, and none of the various existing arrangements or agreements between the two organizations provides for any such overlap in the future. Likewise, CUNA Mutual PAC and CULAC have not indicated any overlap in officers or agents in their filings with the Commission.

There is, however, some overlap in non-governance related committees and at lower levels. Specifically, there is an informal practice whereby the respective boards of directors of CUNA Mutual and CUNA annually appoint the CEO/president of the other corporation as an *ex officio* non-voting member of their respective boards. Several of CUNA Mutual's board members also are tangentially connected to CUNA through service on the boards of local CUNA-member credit unions, and some serve on CUNA's Partnership Committee, but a number of those CUNA Mutual board members are also officers of credit unions that are members of CUNA's main competitor, the National Association of Federal Credit Unions ("NAFCU"). One CUNA Mutual officer, its Senior Vice President for Corporate and Legislative Affairs, also serves on CUNA's Governmental Affairs Committee and its *ad hoc* Broker Activities Task Force. None of

1 these committees, including the Partnership Committee, is vested with any legal control
2 or governance of CUNA. A number of CUNA Mutual officers and employees may also
3 serve on local CUNA-member credit union boards of directors, but only in their personal
4 capacity and not at the behest or control of CUNA Mutual. However, as indicated above,
5 there is no direct overlap between CUNA Mutual and CUNA officers or employees, and
6 the arrangements in non-governance related committees and at lower levels do not
7 constitute the kind of overlap of officers or employees that would indicate a formal or
8 ongoing relationship between CUNA Mutual and CUNA.

9 Finally, the bylaws of CULAC, CUNA's SSF, also provide for an *ex-officio* non-
10 voting representative of CUNA Mutual to CULAC's board of directors. This position,
11 however, has been vacant for more than three years and you state that there are no present
12 plans to fill the position.

13 **F. Whether a sponsoring organization or committee has any members,**
14 **officers or employees who were members, officers or employees of another**
15 **sponsoring organization or committee which indicates a formal or ongoing**
16 **relationship between the sponsoring organizations or committees, or which**
17 **indicates the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F) and**
18 **110.3(a)(3)(ii)(F).**

19 The initial overlap of employees and officers between CUNA Mutual and CUNA
20 that existed during the early stages of CUNA Mutual's formation had ceased by 1960 and
21 therefore does not indicate a continuing or ongoing relationship between the two
22 organizations. In fact, during the past twelve years, no officer of CUNA Mutual has also
23 been an officer of CUNA and, conversely, no officer of CUNA has been an officer of

1 CUNA Mutual. In addition, during the past twelve years, only one CUNA Mutual board
2 member has also been a member of the CUNA board and no CUNA Mutual or CUNA
3 employee has been a member of the other organization's board. Thus, there appears to be
4 no significant overlap between current and past officers or employees of CUNA Mutual
5 and CUNA that would constitute evidence of an ongoing or formal relationship between
6 the two organizations.

7 **G. Whether a sponsoring organization or committee provides funds or goods**
8 **in a significant amount or on an ongoing basis to another sponsoring**
9 **organization or committee, such as through direct or indirect payments for**
10 **administrative, fundraising, or other costs, but not including the transfer to a**
11 **committee of its allocated share of proceeds jointly raised pursuant to 11**
12 **CFR 102.17. 11 CFR 100.5(g)(4)(ii)(G) and 110.3(a)(3)(ii)(G).**

13 As described above, CUNA Mutual and CUNA have entered into several
14 contractual arrangements described as normal business agreements resulting from arm's
15 length transactions. Because these contractual arrangements have resulted from arm's
16 length transactions, they are not the type of financing that would, absent other factors not
17 present here, constitute evidence of affiliation. In addition, although CUNA Mutual
18 provided a one-time \$50,000 payment to CUNA's Administrative Fund to further its
19 political advocacy efforts, CUNA Mutual has not made any other similar payments and it
20 intends none in the future.

21 **H. Whether a sponsoring organization or committee causes or arranges for**
22 **funds in a significant amount or on an ongoing basis to be provided to**
23 **another sponsoring organization or committee, but not including the transfer**

1 **to a committee of its allocated share of proceeds jointly raised pursuant to 11**
2 **CFR 102.17. 11 CFR 100.5(g)(4)(ii)(H) and 110.3(a)(3)(ii)(H).**

3 All funds that are shared on an ongoing basis are the result of business
4 transactions arranged in advance through arm's length transactions. As noted above,
5 CUNA Mutual does not intend to provide funds in furtherance of CUNA's political
6 advocacy and intends to pursue its future political activities through its own SSF that will
7 be "wholly independent" of CUNA and CULAC.

8 **I. Whether a sponsoring organization or a committee or its agent had an**
9 **active or significant role in the formation of another sponsoring organization**
10 **or committee. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I).**

11 In many instances, an active role by one organization in the formation of another
12 organization is evidence that the two organizations are affiliated. Here, CUNA's officers
13 and directors were directly involved in the formation of CUNA Mutual in the 1930s.
14 However, the Commission has previously recognized that one organization's previous
15 relationship with another does not make them permanent affiliates, even where one
16 company established or controlled the other, so long as the one organization does not
17 continue to finance, maintain, or control the other. *See, e.g.,* Advisory Opinions 2002-12,
18 2000-36, 2000-28, and 1995-36.

19 CUNA Mutual and CUNA have endured a significant "period of estrangement."
20 The lack of overlap in officers or employees and the number of formal contracts and
21 agreements that now govern the interactions between the two organizations supports a
22 conclusion that CUNA Mutual and CUNA operate independently. Thus, given the

1 overall context of their current relationship, CUNA's role in establishing CUNA Mutual
2 does not indicate that the two organizations, or their SSFs, are now affiliated.

3 **J. Whether the sponsoring organizations or committees have similar**
4 **patterns of contributions or contributors which indicates a formal or ongoing**
5 **relationship between the sponsoring organizations or committees. 11 CFR**
6 **100.5(g)(4)(ii)(J) and 110.3(a)(3)(ii)(J).**

7 As CUNA Mutual PAC is newly formed, Commission records do not indicate any
8 contributions that would serve as a basis of comparison to contributions made by
9 CULAC. Therefore, at this time, this factor is not relevant to the Commission's
10 affiliation analysis.

11 ***Conclusion***

12 Given the facts and circumstances cited above, including the period of
13 estrangement between CUNA Mutual and CUNA and the entirely separate functions and
14 governance of each organization, the Commission concludes that CUNA Mutual and
15 CUNA are not affiliated for purposes of the Act. Accordingly, CUNA Mutual PAC is
16 not affiliated with CULAC.

17 As noted above, CUNA Mutual PAC is newly formed. In making a conclusion of
18 non-affiliation between CUNA Mutual PAC and CULAC, the Commission assumes that
19 neither CUNA nor CULAC personnel played a role in the establishment of CUNA
20 Mutual PAC. In the absence of information as to CUNA Mutual PAC's operations, the
21 Commission also assumes that the two PACs will operate and make their decisions
22 independently of each other, and that there will be no formal or ongoing relationship

1 between each other or between one PAC and the other's connected organization. *See* 11
2 CFR 100.5(g)(2) and (4); 110.3(a)(1)(ii) and (3); *see also* Advisory Opinion 2001-07.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity.

9
10 Sincerely,
11
12

13
14 Bradley A. Smith
15 Chairman
16

17
18 Enclosures (AOs 2003-21, 2002-15, 2002-12, 2001-07, 2000-36, 2000-28, 2000-15,
19 1999-10, 1998-19, 1995-36, 1995-12 and 1991-24)
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21
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23